

House version exemption (b)(1)

"(b)(1) authorized under criteria established
by an Executive Order to be kept secret in
the interest of the national defense or foreign
policy."

The Senate receded on the rewording of exemption (b)(1).
Certain categories of information protected by statute, Restricted
Data (42 U.S.C. 2162), Communication Intelligence (18 U.S.C. 798),
and Intelligence Sources and Methods (50 U.S.C. 403(d)(3) and g), are
"born classified" and exempted under exemption (b)(3) of the Freedom
of Information Act. If such information is ever subjected to court
review, it is expected that in such cases the court will recognize that
agency heads are required by statute to protect this information and
they do not have the latitude for discretion permitted under
Executive Order 11652.

FREEDOM OF INFORMATION ACT

Senate—May 30, by a 64-17 roll-call vote, passed with amendments HR 12471, to amend the 1966 Freedom of Information Act to improve public access to government materials and strengthen government oversight of the act.

HR 12471 was passed after the Senate adopted two major amendments to further strengthen the 1966 act, causing some senators to drop their support of the bill. (Vote 213, Weekly Report p. 1454)

The Judiciary Committee had unanimously reported a related bill (S 2543) on May 16.

As originally enacted, the Freedom of Information Act (PL 89-487) required the federal government to make documents available to citizens who requested them unless the material fell into any of nine exempted categories. HR 12471 was designed to broaden accessibility to information by prohibiting delays in supplying government materials and by holding federal officials accountable for withholding documents.

The bill made a number of other changes in the law, including authorization to permit judges to authorize payment of attorneys' fees and court costs for plaintiffs who won suits brought for information under the act. The

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expense of the legal remedy provided under the original act had been cited by critics as a major defect of the law. (Senate committee-reported provisions, Weekly Report p. 1391; House passage, Weekly Report p. 775)

Floor Action

Opening the debate, Edward M. Kennedy (D Mass.), sponsor of S 2543, said hearings had shown that there were "major gaps in the law through which agencies were able to justify unnecessary delays, to place unreasonable obstacles in the way of public access, and to obtain undue withholding of information." He said the bill was designed to strike a better balance between disclosure and nondisclosure.

Muskie Amendment

The first of the two major amendments adopted May 30 was offered by Edmund S. Muskie (D Maine). It deleted the specific guidelines in the bill for federal judges to follow in reviewing government claims that national security interests prohibited disclosure of classified information. Muskie said the guidelines were so stringent that they shifted the burden of proof away from the government and made "the independent judicial evaluation meaningless."

Explaining his bill, Muskie said: "In proposing this amendment, I am not asking the courts to disregard the expertise of the Pentagon, the CIA, or the State Department. Rather, I am saying that I would assume and wish that the judges give such expert testimony considerable weight. However, in addition, I would also want the judges to be free to consult such experts in military affairs as the senator from Mississippi (Mr. Stennis) or experts on international relations, such as the senator from Arkansas (Mr. Fulbright) or other experts, and give their testimony equal weight...."

"I do not see why the head of a department should be able to walk into a judge's chamber, knowing that his testimony is against that of any other expert and weighs more than any other on a one-for-one basis. We ought not to classify information by presumptions, but only on the basis of merit."

Kennedy supported the amendment, but Roman L. Hruska (R Neb.), ranking minority member of the committee and chief opponent of the bill on the floor, called Muskie's proposal "unworkable and extremely unwise." "Is it too much," asked Hruska, "to ask that a standard be imposed to guide the court's decision so that a document will not be divulged to all the world if there is a reasonable basis for the classification? I think not." But the amendment was adopted, 56-29. (Vote 211, Weekly Report p. 1454)

Hart Amendment

The second major amendment, sponsored by Hart, was designed to limit the grounds under which investigatory records compiled for law enforcement could be withheld from the public. Under existing law, such records were automatically exempted from disclosure. The Hart amendment, proposed by the American Bar Association, explicitly placed the burden of justifying nondisclosure on the government. It would have to show that disclosure would 1) interfere with enforcement proceedings, 2) deprive a person of a right to a fair trial, 3) constitute an unwarranted invasion of personal privacy, 4) disclose the identity of an informer or 5) disclose investigative techniques and procedures.

Hart's amendment was also vigorously criticized by Hruska who said it was opposed by the FBI. He said it "could hinder the FBI in carrying out its law enforcement responsibility."

The Hart amendment was adopted on a 51-33 roll-call vote. (Vote 212, Weekly Report p. 1454)

Bayh Amendment

The Senate by voice vote also adopted an amendment by Birch Bayh (D Ind.) specifying that information given to an individual would also be made available for general public inspection and purchase if the individual could demonstrate that the information was of "general public concern."

After these amendments were adopted, plus a clarifying amendment introduced by Hruska and approved by voice vote, the Senate took up and passed the House bill after incorporating the language of the Senate-amended S 2543. HR 12471 must now go to a House-Senate conference committee to iron out differences.

Before the vote on passage, Hruska announced that he had planned to vote for the bill as reported, but that he could not support it as amended. He said he would urge the President "as strongly as I can" to veto the bill.